2001

The Modern Relevance of Legitimate Authority and Right Intention

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THE MODERN RELEVANCE OF LEGITIMATE AUTHORITY AND RIGHT INTENTION IN THE JUST WAR TRADITION

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I. INTRODUCTION

Father Schall's insightful comment on the "justice and prudence" of "this war" masterfully demonstrates the continuing relevance of the just war tradition to modern debate on the use of force. Perhaps the legal categories governing war have changed since the time of St. Augustine. Today, lawyers addressing the question of legality, both as a matter of domestic constitutional law and as a matter of international law, tend rather to frame the question as one of "use of force" or "armed conflict" rather than war. In the public dialogue concerning the United States and alliance response to the attack on the Pentagon and World Trade Center of September 11, 2001, moral and legal issues will tend to converge, regardless of how a lawyer would initially frame the question.[1] To the extent, therefore, that the insights yielded by the branch of moral theory reflected in the just war tradition reflects a well-rooted core of moral truth, the Catholic Church's teaching cannot be ignored in the ongoing debate over what to do in this wholly unprecedented situation.

The contribution is also timely and the editors of the Law Review of the Catholic University of America should be commended for their judgment in inviting Father Schall to use this forum to stimulate public discussion of the continuing relevance of the just war tradition. Although the just war tradition has been firmly grounded in the tradition of the Church, only in the last decade through its inclusion in the Church's catechism has it become part of the Church's official teaching.[2]

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1. *See* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS xxvii (1977) ("Policy-oriented lawyers are in fact moral and political philosophers, and it would be best if they presented themselves that way.").

2. RODGER CHARLES S.J., AN INTRODUCTION TO CATHOLIC SOCIAL TEACHING 55 (1999) (citing CATECHISM OF THE CATHOLIC CHURCH (1996)).

Thus, in explaining the philosophic roots of the just war tradition and its connection with moral virtue, Father Schall also has performed a valuable service, heeding the call of the United States Conference of Catholic Bishops that "people of good will are called to . . . teaching the principles of the Church's just war tradition."[3] Moreover, Father Schall's essay provides a conceptual framework for understanding the United States Conference of Catholic Bishop's own Statement of November 14, 2001, which itself also invoked the just war tradition in its analysis of the moral criteria governing the appropriate response to these attacks.[4]

My only disappointment, both with Father Schall's essay and with the Catholic Conference statement, however, is that neither goes far enough in extracting from the just war tradition wisdom that can guide the United States and its allies in the full range of decisions that remain to be made in this crisis. For we need guidance not only on the traditional *jus in bello* concerns of avoidance of unnecessary harm to the innocent and conducting this "war" in a manner that achieves true peace and justice as between the combatants and the innocent victims, but also for the threshold *jus ad bellum* questions of legitimate authority and right intention. It may seem as though these questions are behind us. Thus, with respect to the decisions taken thus far to use force, Father Shall states merely that "the proper political authority was invoked and the right intention war articulated." And the Conference of Catholic Bishops' Statement has nothing substantial to say on these questions.[5]

For policymakers, however, the adoption of a congressional war powers resolution and the assertion of a right under article 51 of the UN Charter to engage in self-defense do not dispose entirely of the question of the legitimacy of the authority for the conduct of this war. That is because the "war" to which both Father Schall and the Catholic Conference refer has not yet been properly defined, leaving its true scope and the identity of all its targets a continuing question of public choice. Thus far, the initial targets of the use of force have been the al Qaeda network, which we believe is principally responsible for September 11; then the Taliban regime, which we believe had given al

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3. Press Release, United States Conference of Catholic Bishops, Efforts Against Terrorism Require Resolve, Restraint, Long-term on Justice and Peace, Bishops Declare (Nov. 15, 2001), *available at* http://www.nccbuscc.org/comm/archives/2001/01-200.htm.

4. United States Conference of Catholic Bishops, A Pastoral Message: Living With Faith and Hope After September 11 (Nov. 14, 2001), *available at* http://www.nccbuscc.org/sdwp/sept11.htm.

5. *See id.* Although it appends the portions of its earlier statement on the just war tradition, "The Harvest of Justice is Sown in Peace" (1993), the statement reiterates the requirements of "Legitimate authority" and "Right Intention". *Id.*

Qaeda material and moral support; and, finally, the state of Afghanistan, which we believe was largely under Taliban control. Yet, President Bush's earliest articulation of war aims goes well beyond even this slippery slope of potential targets. Whether these targets may be expanded are matters, as I will describe below, that remain in some doubt as a matter of law. It may be that some political bargaining may well be necessary, both at the domestic and international levels, before "legitimate" authority is obtained by the United States and its allies as this war continues. But any bargains we may have already made tacitly, or may well in the future make explicitly, to obtain the appearance of legitimate authority may well in turn compromise the "rightness" of our intentions. For example, expanding the definition of "terrorists" to include those resisting "tyranny" in states whose support we find crucial, could well turn our war against terrorism into a pretext for reshaping the international order in a way that suits our broader, yet more selfish, national interests. Surely the just war tradition has something relevant to say on that.

In this brief comment, I want to argue, without making any definite judgments about the current situation, that our understanding of the just war should pay attention to the questions of legitimate authority and right intention for use of force. To do this, we should take into account the procedural values of modern constitutional democracy and transnational governance. We should also consider the intentions established through the political processes legitimating those war aims as the relevant intentions for assessing whether the use of force comports with the moral criteria of the just war. Indeed, if the just war's aims are not publicly justified through a relevant political process, how can we be confident that right intention springs from legitimate authority or that either reflects the measure of the prudence, or other characteristic virtues of the Christian character, that must be evidenced in every judgment of practical reason for the sake of the common good?

II. THE JUST WAR TRADITION AND LEGITIMATE AUTHORITY

While secular versions of the just war tradition originated in the practical power politics of the Greek city-states and the Roman republic, the Catholic Christian's beginning point must be the question: "Why not pacifism rather than war?" For the first three centuries at least of the Christian era, for example, when Christians were not in state power and instead faced the power of an unjust state, Biblical commands against taking of life, even at the cost of submitting to evil authority, generally

took precedence.[6] When Christians took power, the Imperial Roman State became the vehicle for establishing good order through which, in theory at least, the common good could be pursued. Defense of that state became a moral possibility, and St. Augustine's reformulation of just war doctrine facilitated that doctrinal shift.

Because Augustine argued that Christian participation in the imperial armies to kill the enemies of Rome was morally defensible, the key first move in his argument was that the Christian emperor could command his soldiers to kill in defense of the Empire. The authority of the Emperor, beginning with Constantine's charismatic claim that God was on his side at Milvian Bridge, could be partially legitimated in theological terms. The great disorder of the fourth and early fifth centuries, moreover, compelled Augustine to see the virtues of pacifism as subordinate to the need for order; consequently, he emphasized the basic illegitimacy of bands of armed men acting essentially as criminals dispossessing the Christian inhabitants of the empire of their worldly goods and even their lives.[7]

This did not mean that great states were necessarily virtuous, for Augustine recalled the ancient tale of the garden-variety pirate who, when captured by Alexander the Great, dared to accuse the conqueror of the known world of being nothing more than a pirate on a somewhat grander scale.[8] Thus acknowledging that great states too can act much like criminals, Augustine made provision for the moral authority of the Church to guide the state in the exercise of its judgment.[9] He may have been closer to the truth of his own time than even he himself may have feared, for, as Roland Bainton has persuasively argued, it was Emperor Valens' own bad faith, including the breaking of his pledge to the barbarian tribes living north of the Danube to permit their settlement inside the empire, that led to a final attack on his forces at the decisive battle of Adrianople in 378 A.D. and the final destruction of the imperial army as a bulwark against barbarian invasion.[10] In sum, Augustine's hierarchical view of the political and moral universe made the claim of

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6. *See generally* ROLAND H. BAINTON, CHRISTIAN ATTITUDES TOWARDS WAR AND PEACE 66-84 (1960).

7. *See id.* at 93 (appealing to the Roman General Boniface to continue to defend Africa from the barbarians rather than retire to the monastery).

8. Ian A. McLean, *Criminal Law and the Natural Law*, *in* COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW 259, 265 (Edward B. McLean ed., 2000) (quoting ST. AUGUSTINE, CITY OF GOD, 112-13 (Marcus Dodds trans., 1950)).

9. ROLAND H. BAINTON, CHRISTENDOM: A SHORT HISTORY OF CHRISTIANITY AND ITS IMPACT ON WESTERN CIVILIZATION 129 (1964).

10. CHRISTIAN ATTITUDES, *supra* note 6, at 100.

legitimacy of the authority calling on Christians to kill central to his teaching.[11]

By parity of reasoning, the conscience of the ruler commanding what would otherwise be murder, like the conscience of the combatant himself, could be free from sin if the right mental intention could be established. The relevance of the just war criteria of legitimate authority and right intention should now be clear. Practical reason requires deliberation concerning the relation between considerations of prudence and moral precepts in the pursuit of a vision of the good.[12] When public authority is involved, practical reason requires deliberation instead directed toward the pursuit of the common good.[13] Thus, the heart of the matter is that decisions, under the natural law background to the just war doctrine, reflect the exercise of right reason—that is, "reason unfettered by emotional or other impediments to choosing consistently with what reason fully requires."[14] Deliberation about the common good, with the assurance that "emotional or other impediments"—such as the desire for vengeance, xenophobia or other prejudices, or naked lust for power or greed—do not impair the exercise of right reason, is best conducted in public and under procedures that ensure the participation of all those to whose good an action is directed. Modern natural law reasoning, moreover, emphasizes the need for moral discourse within the context of a social community, and correlatively of public justification for competing visions of the common good, rather than "from the standpoint of an isolated non-social individual."[15] Indeed, those committed to political democracy within the pluralist international, and perhaps even domestic, context as the means for searching for the common good can find authority for this view in a reading of Thomas Aquinas's understanding of natural law in the reconciliation of faith and reason, an approach which makes clear that the pursuit of truth requires recognition of the "goodness and value of things human which are not explicitly dependent on their place in Christian salvation."[16] While broad public

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11. *See* PAUL E. SIGMUND, NATURAL LAW IN POLITICAL THOUGHT 29-30 (1971).

12. Robert George, *Natural Law and Positive Law*, *in* COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW 151, 155 (Edward B. McLean ed., 2000).

13. McLean, *supra* note 8, at 265.

14. George, *supra* note 12, at 154-55.

15. Alasdair MacIntyre, *Theories of Natural Law in the Culture of Advanced Modernity*, *in* COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW 90, 112 (Edward B. McLean ed., 2000).

16. Rev. John Jenkins, C.S.C., *Aquinas, Natural Law, and the Challenges of Diversity*, *in* COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW 57, 67 (Edward B. McLean ed., 2000).

discussion of the requirements of the common good cannot absolutely guarantee that public authorities pursue the common good, at least the public exercise of right reason will make clear to humanity the actual purpose and likely effect of the proposed course of actions.

For Christian lawyers concerned about the application of just war criteria to the suppression of international terrorism, and our implied claim to treat terrorists as combatant war criminals, rather than as mere perpetrators of common crimes, the legitimization as a matter of domestic and international law of our course of action is a pressing issue. For the United States, the legitimacy of the authority for the use of force, the unleashing of war, must be tested, not by the charismatic authority of the Prince, but rather by the constitutionally prescribed authorities of the President and the Congress. For the United States, as a member of the international community, its authority as a nation to use force may well be tested under international law. The U.S. Congress and the UN Security Council are important, albeit not the exclusive, fora for these ordeals. Some have argued that, even in the international response to the Iraqi attack on Kuwait a decade ago, the Security Council added "little to the moral, or even the legal, argument."[17] Yet, surely no one will claim that President Bush's private views constitute the relevant set of intentions for the initiation or conduct of this war under either domestic or international law. Thus, the explanation given by the United States and its allies to the Security Council and the reaction of the world community to that explanation must be relevant to a moral, and certainly a legal, analysis of the question. If we have followed the procedures required under both the U.S. Constitution and the UN Charter systems of discursive justification, and in that context explained the reasons for which the war is launched, then perhaps the justice of our cause will be reaffirmed, the clarity of our commitment to act in the common good will be manifest, and the public's confidence in the continuing justice of our course of action will be reinforced.

Now, under this approach, when war is unleashed not by a single ruler but rather by a lawfully constituted authority in accordance with the norms governing that decision making process, the claims of pacifism can be resisted under a modern reformulation of St. Augustine's just war doctrine. If, on the other hand, a state which directs Christians to kill is not acting within the scope of its authority to act for the common good or with the intention of furthering that common good, then we can properly question whether the Christian ethic of pacifism becomes a more

17. WALZER, *supra* note 1, at xxii.

compelling moral option. It appears that at least a significant minority of the membership of the United States Conference of Catholic Bishops who opposed the Conference's own statement on November 14, 2001, on the aftermath of September 11, may have come to this conclusion.[18] Why should that be so in the present circumstances, when Father Schall and the majority of the Bishops have made so compelling a case for the justness of the cause to defend the innocents murdered by the al Qaeda network and its supporters and the strength of the United States and allied claim that all peaceful measures have been exhausted, making the attack on the Taliban truly our last resort?

III. THE JUST WAR TRADITION AND DOMESTIC AND INTERNATIONAL LEGAL AUTHORITY

The Bush administration faces some difficult choices in the near future, mainly in selecting among the range of policy options involving the use of force. The most pressing factor in making these choices is, obviously, their potential efficacy in deterring future terrorist attacks on the United States and its allies. These difficult choices may depend on the availability of diplomatic options that, together with the threat of potential military action, could somehow persuade terrorist adversaries of the United States and its allies that the price they will pay far exceeds any potential gains. But the most important strategic question seems to be whether to expand this "war" beyond the current use of force against the Taliban and al Qaeda in Afghanistan. That said, the Bush administration itself also faces a potential price in international and domestic consensus if it were to escalate, and perhaps even if it were merely to threaten to use force, without the specific consent of either the UN Security Council or the U.S. Congress. Already the Administration has tested these waters in a message to the Security Council reserving the right to do so under article 51 of the UN Charter,[19] a step that has already rankled even key NATO members of the coalition President Bush has

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18. Alan Cooperman, *Roman Catholic Bishops Declare U.S. War is Moral: But Poverty and Injustice at Root of Terrorism Should be Addressed, Pastoral Statement Says*, WASH. POST., Nov. 16, 2001, at A37.

19. Colum Lynch & Steven Mufson, *U.S. Reserves Right to Attack State Sponsors Of Terrorists; U.N. Charter Recognizes Acts Of Self-Defense, Envoy Says*, WASH. POST, Oct. 9. 2001, at A13 ("In a letter to the Security Council, U.S. Ambassador to the United Nations John D. Negroponte said the strikes underway against Afghanistan are acts of self-defense under article 51 of the U.N. Charter."); Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2001/946, *reprinted in* 40 I.L.M. 1281 (Sept. 2001).

assembled through skillful public and private diplomacy and may well provoke an early skirmish with Congress.[20]

The questions, thus, are whether the United States already has all the legal authority necessary under international law and whether the executive branch has all the authority it needs under domestic constitutional law to execute any conceivable range of military options necessary to achieve the United State's political objectives in a war against terrorism. The answers to these questions, however, are not so clear. Surely no one would argue that the recent congressional resolution authorizing the use of force by the United States in response to the attacks on the World Trade Center and the Pentagon are a blank check of war-making authority to the executive branch.[21] Indeed, there is some indication, though there is also evidence to the contrary, that the Bush administration sought but was denied the equivalent of an explicit declaration by Congress of the existence of the state of war between the United States and states harboring terrorists.[22] Despite its adoption at lighting speed, Congress should not be understood to have enacted a

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20. Judy Dempsey & Carola Hoyos, *Attack on Afghanistan Politics – US Warns it May Attack Other States*, FIN. TIMES, Oct. 9, 2001 ("The US intention to possibly widen its military campaign has already raised serious questions among Security Council members.").

21. The executive branch has consistently taken the position that a congressional authorization is superfluous as a matter of constitutional law when the President acts within his so-called inherent constitutional authority to "repel sudden attacks" even against U.S. citizens abroad. *See, e.g.*, Durand v. Hollins, 8 Fed. Cas. 111 (1860) (holding that presidential directive lawful defense to action of trespass against U.S. military officer for use of force in Greytown, Nicaragua to protect American nationals). Read in this context, the plain words of the resolution might be read broadly, although the text of the resolution itself only grants the executive branch authority limited through critical qualifying language as to the "appropriateness" of the use of force and only as to targets bearing a specified level of culpability. Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), *reprinted in* 40 I.L.M. 1282 (Sept. 2001). The Joint Resolution authorized the President:

> to use all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

22. Edward Alden, *Assault on American Politics – Sweeping Powers for Bush Brings Memories of Vietnam*, FIN. TIMES, Sept. 17, 2001 (reporting that Congress "refused [President Bush's] request for unlimited authority to 'deter and prevent' any future terrorist strikes against the US").

second Tonkin Gulf Resolution.[23] The precise scope of this congressional authorization to use force remains to be interpreted authoritatively. President Bush's 1990-91 decision to rely, in part, on the explicit congressional authorization for launching operation Desert Storm, an authorization granted in the context of an explicit executive branch threat backed by prior UN Security Council authorization to forcibly expel Iraqi forces from Kuwait, should serve as a precedent.[24] This second Bush administration might be counseled to seek additional congressional authorization when, and if, significant military operations outside Afghanistan become a serious policy option.

With respect to its international legal authority, the administration is likely to consider the need for explicit Security Council authorization for the use of force in terms of its impact on the coalition. Indeed, the best may become the enemy of the good if the administration overreaches and thereby undermines international political consensus necessary to ensure full implementation of the unprecedented non-military sanctions the Security Council has already imposed or prevents the adoption of any additional economic sanctions should they become necessary. Some may argue that the "inherent" right of self-defense in the face of an "armed attack," under article 51 of the U.N. Charter, already grants the United States all the authority it needs[25] -- indeed, even that it trumps a

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23. *Id.*

> Congress's actions on the resolution was the swiftest since the Tonkin Gulf resolution, which passed with only two dissenting votes just five days after a North Vietnamese attack against U.S. destroyers. The Tonkin vote authorized the president to "take all necessary steps, including the use of force" to aid US allies in south-east Asia.

Id.

24. While the Bush administration formally reserved its constitutional position, maintaining that congressional authorization was not constitutionally required, it nonetheless acted in compliance with the resolution by filing the report to Congress required under the resolution to trigger its validity as a source of constitutional authority. Authorization For Use of Military Force Against Iraq Resolution, Sec. 2(b), H.J. Res. 77, 102d Cong., 1st Sess. (Jan. 12, 1991) ("Before exercising the authority granted . . . the President shall make available to [Congress] his determination that . . . the United States has used all appropriate diplomatic and other peaceful means to obtain compliance by Iraq with the United Nations Security Council resolutions . . . ."); *see also* President Bush's Letter to Congress Re: Attack on Iraq, Jan. 16, 1991, and accompanying Report, *reprinted in* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 911 (1999).

25. *See generally* I.L.M. Special Section on Terrorism-Related Documents, 40 I.L.M. 1254 (Sept. 2001) (supplying an impressive collection of statements from the EU, OAS, NATO, OECD, UN General Assembly, and UN Security Council, albeit not through a chapter VII resolution, generally buttressing the view that the United States' right to self-defense in this case is widely recognized internationally).

UN Charter-based collective security system that is now defunct, as some have argued, even as to humanitarian intervention.[26] Certainly, NATO, which most everyone recognizes as a collective security organization foreseen by the UN Charter as the potential beneficiary of UN Security Council authorization for the use of force, has already termed the attack on the World Trade Center an "armed attack" for purposes of the NATO treaty's collective security commitment.[27] The legal rub is that NATO's judgment about what constitutes an "armed attack" is not binding on the Security Council or the International Court of Justice, each of which has taken positions in past cases and incidents at variance with the broader U.S. interpretation of the inherent right of self-defense and certainly at variance with the view that any terrorist attack sponsored, or acquiesced in, by a state justifies the use of force to punish those responsible or even to prevent further such attacks.[28] Indeed, were the United States to act without Security Council authorization, it might be setting a precedent that could justify Russian or Chinese action in

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26. *See generally* W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 18 (2000) (suggesting that the fact that the "international legal process is more able than constitutive structures of the past to compel the provision of remedies for some grave human rights violations is a cause for satisfaction"). *Compare* Michael Glennon, *The New Interventionism: The Search for Just International Law*, 79 FOREIGN AFF. 2 (1999) (describing Kosovo intervention by NATO without prior UN authorizing resolution as paradigm shift), *with* Thomas Franck, *Sidelined in Kosovo?: The United Nations' Demise Has Been Exaggerated – Break It, Don't Fake It*, 79 FOREIGN AFF. 2 (1999) (describing Kosovo action as an aberration rather than the rule). Former Acting State Department Legal Adviser, Michael J. Matheson, lucidly describes a range of competing positions on the interface between law and morality of humanitarian intervention in the absence of explicit Security Council authorization, as follows: legal; prohibited; prohibited under the Charter but in the process of legalization as a matter of custom; and prohibited by both Charter and customary law but nonetheless justifiable on moral grounds. Michael J. Matheson, *Just War and Humanitarian Intervention: Comment on the Grotius Lecture by Jean Bethke Elshtain*, 17 AM. U. INT'L L. REV. 27, 29-30 (2001).

27. Statement by NATO Secretary General, Lord Robertson, 2 October 2001, *reprinted in* 40 I.L.M. 1268 (Sept. 2001) (confirming that the attack was from a source outside the United States); Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), *reprinted in* 40 I.L.M. 1267 (Sept. 2001) (invoking the collective security provisions of NATO with respect to an "armed attack" on a NATO member, conditional on finding that the attack on the United States was "directed from abroad").

28. *See* Military and Paramilitary Activities In and Against Nicaragua, [Nicaragua v. United States of America], 1986 I.C.J. Rep. 14, 103-23, paras. 195-238 (discussing limits on "inherent right" of individual and collective self-defense); *see also* S.C. Res. 573, U.N. SCOR (1986) (condemning Oct. 1, 1985, Israeli bombing of PLO headquarters in Tunis, despite Israeli claim of a right to act in its self-defense when Tunisia was harboring known terrorists who would commit future terrorist acts against Israel); Gregory H. Fox, Addendum to ASIL Insight on Terrorist Attacks, Sept. 14, 2001, *available at* http://www.asil.org/insights.htm.

neighboring states on the pretext of the suppression of domestic and international terrorism.

But the moral force of an explicit Security Council authorization is not unproblematic either.[29] Perhaps most important, however, seeking Russian and Chinese support for a Security Council resolution explicitly authorizing U.S. use of force might invite either or both countries to seek in return explicit U.S. recognition of the "terrorist" character of national minorities within Russia and China who now claim the right to self-determination and, perhaps, even secession. Accordingly, what this administration should not do is seek Security Council authorization for the use of force, as the Bush administration arguably did in 1990,[30] in order to facilitate the adoption of a congressional resolution in January 1991 authorizing the use of force against Iraq.[31] A Security Council resolution should be sought this time only after clear domestic authorization is available. In that way, the risk that the administration will bargain away the fates of subject peoples elsewhere could be lessened.

IV. CONCLUSION

The questions raised here concerning the domestic and international political and legal processes are relevant to a moral argument that *jus ad bellum* criteria of legitimate authority and right intention have been met in the current campaign in Afghanistan. No doubt some, such as the minority faction of the Conference of Catholic Bishops who preferred to hold to the background position of Christian pacifism even in this case, might have been entitled to stake out a moral-based claim — seeking

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29. *See* LEA BRILMAYER, AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE-SUPERPOWER WORLD 102 (1994) (arguing that ex ante consent to use of force authorized in accordance with Security Council procedures helps to legitimate use of force to enforce international law against a sovereign state that is a member of the United Nations). Afghanistan's lack of participation in the UN, through the non-recognition by the UN of the Taliban Government, may well have attenuated the force of its ex ante consent to the procedures and authorities of chapter VII of the UN Charter.

30. S.C. Res. 678, U.N. SCOR (1990) (authorizing "all necessary means to uphold and implement" prior Security Council resolutions, among other things, requiring the withdrawal of Iraqi forces from Kuwait).

31. The Iraq War Powers Resolution provided in relevant part:

> The President is authorized, subject to subsection (b), to use the United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve the implementation of Security Council Resolutions [adopted under chapter VII of the UN Charter with respect to Iraq's unlawful occupation of Kuwait].

Id.

more political process, more public debate, more thoughtful deliberation — before the military operation in Afghanistan was launched. One can easily see, as Father Schall has persuasively argued, that the better case on grounds of just cause and necessity was for more immediate action to capture or kill the threat posed by Osama bin Laden himself and his network of operatives. But as we move farther away from those narrow war aims, the demands of legitimate political authority and right intention surely become more compelling. If this war is to expand, therefore, our moral position will surely be buttressed if we err on the side of caution in exhausting the procedural mechanism made available by domestic and international legal frameworks. The pragmatism of the first Bush administration should thus, in the second Bush administration, give way instead to moral prudence.